Supreme Court, U.S.
FILED
AUG 7 - 2000
OFFICE OF THE CLERK

No. 00 . 638

THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEDA, Warden, Deuel Vocational Institution, Tracy, California; PEOPLE OF THE STATE OF CALIFORNIA, Respondents - Appellees,

Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT J. BELES, ESQ.
One Kaiser Plaza, Suite 1750
Oakland, California 94612
Tel. No. (510) 836-0100

PAUL MCCARTHY, ESQ.
One Kaiser Plaza, Suite 1750
Oakland, California 94612
Tel. No. (510) 836-0100

Attorneys for *Petitioner* KEVIN PHELPS

36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the one year statute of limitations under 28 U.S.C. §2254 have been equitably tolled, assuming it had expired before petitioner filed his federal habeas corpus petition?

2. Did the courts' failure to equitably toll the statute of limitations deprive petitioner of his right to procedural due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

3. Had the one year statute of limitations under 28 U.S.C. §2254 expired when petitioner filed his federal habeas corpus petition?

TABLE OF CONTENTS

Table of Authorities ii

Petition for Writ of Certiorari 1

Citations of Opinions and Orders Entered in the Case 1

Basis for Jurisdiction in this Court 2

Constitutional Provisions Involved in the Case 2

Statement of the Case 3

Reasons for Allowance of the Writ 6

EQUITABLE TOLLING 8

FINALITY DATE 12

Conclusion 14

INDEX A-1

TABLE OF AUTHORITIES

Cases:

Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283 (9th Cir 1997) 11

Calderon v. United States District Court (Kelly), 128 F.3d 1283 (9th Cir 1997) 11, 12

Connecticut v. Doehr, 501 U.S. 1 (1991) 7

Funk v. Sperry Corp. (9th Cir. 1988) 842 F.2d 1129 12

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) 11

In re Dominguez (9th Cir. 1995) 51 F.3d 1502 12

Irwin v. Veterans' Administration (1990) 111 S.Ct. 453 12

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 -172 (1951) 7

Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), ... 13

Luna v. Department of HHS, 948 F-2d 169 (5th Cir. 1991) 12

Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) 13

Scholar v. Pacific Bell (9th Cir. 1992) 963 F.2d 264 12

Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044 (9th Cir.1987) 12

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394, 102 S.Ct. 1127, 1133, 71 L.Ed.2d 234 (1982) 11

Statutes:

28 U.S.C. § 2254 ..... 7, 12, 14

28 U.S.C. § 2254(d)(1)(A) 7

28 U.S.C., § 1254(1). 2

California Rule of Court 24(a) 13

California Rule of Court 29 13

California State Constitution, Article VI, section 10. 13

Fifth Amendment, United States Constitution 6

Fourteenth Amendment, United States Constitution 6

Supreme Court Rule 13.1 2

Supreme Court Rule 29.2 2

No. _____

THE SUPREME COURT OF THE UNITED STATES
October Term, 1999

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEDA, Warden, Deuel Vocational Institution, Tracy, California; PEOPLE OF THE STATE OF CALIFORNIA, Respondents - Appellees,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, KEVIN PHELPS, through his undersigned counsel, respectfully petitions this court for the issuance of a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit for the review of the judgment affirming the decision of the District Court for the Northern District of California. The mandate was filed May 17, 2000. The Order denying petitioner's petition for rehearing was filed on May 8, 2000. The orders and opinions are attached as an appendix.

In support of said petition states as follows:

CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE CASE

No opinion or order in this case is published.

BASIS FOR JURISDICTION IN THIS COURT

This Honorable Court has discretionary jurisdiction to review cases in the courts of appeals by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree, as provided by 28 U.S.C., § 1254(1). This Petition seeks to review the final judgment of the United States Court of Appeals for the Ninth Circuit. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Hawaii and the petition was denied. Upon appeal to the Ninth Circuit Court of Appeals the matter was affirmed.

The judgment of the Court of Appeals was filed and entered on May 8, 2000, the mandate was filed and entered on May 17, 2000; and, the petition is, therefore, timely filed pursuant to Supreme Court Rules 13.1 and 29.2, if mailed by first-class mail, postage prepaid, and bearing a postmark on or before August 8, 2000 (since August 7 falls on a non-court day.).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT [SECTION 1.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged with first degree murder in the Superior Court of the County of Contra Costa, California. Two trials ended in deadlocked juries. Petitioner was convicted following a third jury trial.

Following the trial, petitioner moved for a retrial, presenting the testimony of a newly discovered eyewitness who stated that petitioner was not among the assailants. When this motion was denied, petitioner filed an appeal and also a state habeas corpus proceeding in which he offered newly discovered evidence, including a second eyewitness, among other issues.

Following denial of his state habeas corpus petition by the California Court of Appeals, petitioner timely filed a document entitled "petition for review" with the California Supreme Court in January of 1997.[1]

---

[1] The State of California later acknowledged: "When an inmate's petition for writ of habeas corpus in the Court of Appeal has been denied, the inmate may either petition for review of that decision in the California Supreme Court (Cal. Penal Code § 1506; *In re Michael E.*, 15 Cal-3d 183, 193 n. 15 (1975)) or file an original petition for habeas corpus in the California Supreme Court See *In re Catalano,* 29 Cal-3d 1, 7 (1981). The

On March 27, 1997, the California Supreme Court issued an order which provided:

> "The time for granting or denying review in the above cause is hereby extended to and including May 15, 1997, or the date upon which review is either granted or denied.". (ER 161)[2]

The California Supreme Court served the order upon petitioner's counsel, who then calendared May 15, 1997 as the tentative date on which review would be denied.

On April 30, 1997, fifteen days before the previously mentioned deadline of May 15, 1997, the California Supreme Court issued an order denying the petition for review. (ER 122) The California Supreme Court did not preserve any information that it had ever served this order on any of the parties. (See Declaration of Natalie Robinson at ER 198-201). For the purposes of the Federal Court proceedings, the District Court and Court of Appeals both assumed that the California Supreme Court did not serve this order on anyone. (ER -13).[3]

---

two courses of action appear to differ in name only." (Respondent's Reply to Petitioner's Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus as Untimely, ER 164.)

[2] The citations are from the Excerpt of Record prepared and filed in the U.S. Court of Appeals for the Ninth Circuit.

[3] In its initial motion, Respondent submitted its motion to dismiss with a declaration that represented the record before the California Supreme Court in petitioner's case as consisting of only two documents – the original petition for review and the April 30 1997 order denying review (ER 120-149).

In response, petitioner's counsel submitted a copy of the March 27, 1997 order (ER 161), with a declaration stating that it had never received

On May 15, 1998, petitioner filed a habeas corpus petition in the United States District Court for the Northern District of California (ER 46-109).

Respondent then moved to dismiss the petition on the grounds that it was filed after the one year statute of limitations set forth in 28 U.S.C. §2244 had expired. (R. 112 - 119). In opposing the motion to dismiss, petitioner argued that under the Supreme Court's rules, assuming that the April 30, 1997 order was valid, it was not final for thirty days following its entry, making the date of finality May 30, 1997. Petitioner also argued that the April 30, 1997 order was ineffective because it was signed only by a single judge and not the majority of the court. (Combining the two arguments, the date of finality could be as late as June 14,1997.) Alternatively, petitioner argued that he had relied on the March 27, 1997 order, which stated that review would be deemed denied on May 15, 1997, and that, having not received a later order, petitioner's reasonable reliance equitably tolled the statute of limitations. (ER 150-162).

---

the April 30, 1997 order. In response, respondent's counsel submitted a declaration admitting that the March 27, 1997 order existed. Respondent explained that it had only requested the petition and the denial from the California Supreme Court, not any other part of the record. Respondent also declared that it had not received copies of any of the filings, including either order while the petition was pending before the California Supreme Court" (ER 173).

Shortly after submitting the second declaration, respondent filed a third declaration contradicting the second declaration. Respondent's third declaration alleged that its docketing unit had received a copy of the petition for review and the April 30, 1997 denial of the petition shortly after these documents were filed. The third declaration did not mention that respondent had ever received the March 27, 1997 order extending the time for complete initial review to May 15, 1997. The declaration was simply from the attorney filing the response, with no declaration from anyone in the docketing unit who might have received the documents.

Respondent submitted a supplemental memorandum with a declaration from a clerk of the California Supreme Court stating that the court had a "usual practice" to always issue an order either granting or denying review, and not allow review to be "deemed denied" by operation of California Rules of Court 28(f). The declaration did not say whether this "practice" was anything more than what the clerk believed the court usually did, or whether the court had made any efforts to inform the public of the existence of this "practice". (ER 212-214). There is no court rule to this effect. No evidentiary hearing was ever held to determine whether this "practice" existed outside of the clerk's mind, whether it was generally known to litigants appearing before the California Supreme Court, or what effect the California Supreme Court's desire not to have its decisions challenged in federal court might have on its clerk's opinions. Despite this, both the District Court and the Court of Appeals were to treat this "practice" as if it ***was*** something generally known by litigants appearing before the California Supreme Court.

The District Court dismissed the habeas corpus petition. Petitioner filed an appeal.[4] The Court of Appeals affirmed the dismissal.

REASONS FOR ALLOWANCE OF THE WRIT

The basic requirement of the procedural due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution is reasonable notice. "'...fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o

---

[4] The district court declined to grant a certificate of appealability on the equitable tolling issue, but the Court of Appeals reached it anyway, and in any case, this court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability under 28 U.S.C. § 2253(c). *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969 at 1971, 141 L.Ed.2d 242 (1998.)

better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.'" *Connecticut v. Doehr*, 501 U.S. 1 (1991), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 -172 (1951) (Frankfurter, J. concurring.)

The 1996 amendments to 28 U.S.C. §2254 added a one year statute of limitations for the filing of a petition for habeas corpus directed to a state court conviction. Section (d)(1)(A) of section 2254 measures the one year period from the date on which the direct appeal or an application for state post-conviction or collateral review becomes final, whichever is later. Previously, there was no statute of limitations and petitions were governed only by laches.

The statute of limitations was adopted to address what Congress believed was an abuse of the writ, prisoners filing habeas petitions in Federal court years after the state proceedings were concluded. The decisions below turn this rule into a procedural game designed to trap unwary, but diligent habeas petitioners into filing their petitions a few days beyond the expiration of the statute.

The state Supreme Court first issues an order informing the parties that the period for considering review will expire on May 15, 1997, and if the court takes no action, the petition will be deemed denied on May 15, 1997. The court serves this order on the parties. Two weeks before May 15, 1997, the state Supreme Court issues a second order denying the petition. The Court does not serve this order. Any reasonable litigant would have relied on the court order that was served, which, to all intents and purposes, set May 15, 1997 as the date the petition would be denied and which would mark the beginning of the one year limitation period. Only the most suspicious, cynical litigant would have considered the possibility that the court might have filed, but not served, a second order setting an earlier denial date. Yet the Court of Appeals held that petitioner should have assumed that the State

Supreme Court was "hiding the ball" and scoured the court's file for any unserved further orders before filing his habeas corpus petition in federal court. The Court of Appeals apparently held that the petitioner should have expected a second order to be filed by assuming petitioner had been, or should have been privy to "inside information" on what the court's unwritten policies might be. As the Court of Appeals would have it, the unnoticed rule would have notified petitioner of the existence of the unnoticed order.

EQUITABLE TOLLING

Indeed, the district court at first appeared to appreciate the inherent unfairness of charging petitioner with notice of an unserved ***second*** order when an ***initial*** order had already presumptively set the finality date on the petition for review. During the hearing on respondent's motion to dismiss, the following exchange occurred:

> The court: "On the question of equitable tolling, it is my understanding that counsel for the petitioners have stated that they never got notice of the actual denial. All they received was an earlier notice that said that the time within which to rule was extended and that if there were no granting or denial before the date to which the extension was given, that the petition is deemed denied, Correct?"
>
> Petitioner's counsel: "Correct."
>
> The court: "And you got that. And you did not get the subsequent ruling on the merits and thus believed from the state of the record, as you understood it, that the

time to rule basically expired and by operation of law the petition were deemed denied, correct?"

Petitioner's counsel: "Correct."

The court: "and cutting it very close, but, nonetheless, within the statutory time period, as your office recognized it to be, you filed the petition in what you understood to be a timely fashion without any request for any consideration or need to have, quote, unquote, extra time.

Now, that distinguishes this case from the cases that ordinarily might come up under the Antiterrorism and Effective Death Penalty Act, where people are ordinarily asking for special consideration to extend the time because they were unable to file within the time limits -- and those are the extraordinary circumstances -- war, torture, all manner of dramatic things, and sometimes more mundane things that the court deals equitably are within the exception. But this is an entirely different situation...."

(Transcript, September 25, 1998, pp. 12-14,

The court: "Ordinarily if one can reasonably rely on notice being sent and one doesn't receive the notice, then it would seem to me that

at least some argument could be made for equitable tolling because the behavior of the person who was kept in the dark hasn't created, if you will, the problem. So it seems to me this isn't a case that is analyzed under what might be considered the extraordinary circumstances of AEDPA as much as just the traditional concept of when somebody reasonably might be expected to understand the statute to start running.

The difference we have here is a matter of just a couple of weeks. We're not dealing with somebody who sat around for a years saying, 'gee, I wondered why they haven't written, they haven't called, I haven't heard from them.'

They also have that notice, which you did not get in the first instance because it wasn't something you merely order up from the supreme court that could well lead them to believe that they weren't simply dealing with a vacuum.

In other words, they file a petition, six years goes by, they haven't heard from anybody. Well, fine. One might say that that seems extraordinarily long. You would have gone and checked before you did. But here they actually are told that you may not hear from us.

> And if you don't, you are to consider that your petition has been denied. So if you haven't heard from us by a particular date, that's the effect."

(Transcript, pp. 19-20).

However, in its opinion dismissing the petition, the district court ignored the differences it itself had recognized and compared the case to those holding that a court's failure to serve notice of a judgment did not excuse the late filing of a notice of appeal. involving unserved judgments and untimely appeals. However, not only would a judgment be the "initial" order that a petitioner would have expected, but a notice of appeal is jurisdictional, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), while section 2254's statute of limitations is not. It is phrased only as a "period of limitation" and "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283 at 1288 (9th Cir 1997), quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 1133, 71 L.Ed.2d 234 (1982). That it not jurisdictional is the reason why equitable tolling applies at all.[5]

This case involves petitioner's reasonable reliance on an existing court order, and inadequate notice of a second court order purporting to alter the finality date in the first one. Both grounds, separately, have been held to equitably toll a statute of limitations.

In *Calderon v. United States District Court (Kelly)*, 128 F.3d 1283 at 1289 (9th Cir 1997), Petitioner had filed a motion for

---

[5]Statutes of limitations are presumptively subject to equitable tolling. See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990)

appointment of counsel in federal court in 1992, but no petition, and the district court had stayed all further filings until petitioner's competency to proceed had been evaluated. As of 1997, the habeas petition has still not been filed. Despite this, the Court of Appeals held that the existing stay order rendered the filing of a petition beyond the petitioner's control, but strictly speaking, it did not, since petitioner's counsel could have applied for an order modifying the stay (counsel would have had to do so at some time anyway, or the case would never proceed.) In reality, petitioner's counsel relied on this existing stay as justification for not filing the petition. *Kelly* is a much more extreme case than this one. The delay in *Kelly* was five years, not two weeks, and notice was not an issue, as counsel was well aware of both the status of the case and the amendments to section 2254.

Inadequate notice of a deadline or event starting the running of the statute will also equitably toll a statute of limitations. See *Scholar v. Pacific Bell* (9th Cir. 1992) 963 F.2d 264 at 268, citing *Irwin v. Veterans' Administration* (1990) 111 S.Ct. 453, 457-8, *In re Dominguez* (9th Cir. 1995) 51 F.3d 1502 (equitable tolling found when the court misleads the creditors by citing an erroneous claim filing deadline), *Luna v. Department of HHS*, 948 F-2d 169, 173 (5th Cir. 1991) (plaintiff is entitled to "equitable tolling" of the 30-day time limit for filing a notice of appeal because the district court "purported to retain jurisdiction, thus unwittingly misleading the plaintiff to think that no final judgment was being entered."), *Stallcop v. Kaiser Foundation Hospitals,* 820 F.2d 1044, 1050 (9th Cir.1987) (equitable tolling can apply if the petitioner was "excusably ignorant" of the limitations period.), *Funk v. Sperry Corp*. (9th Cir. 1988) 842 F.2d 1129, 1133 (same).

Since this case combined both factors, the statute should have been doubly tolled.

FINALITY DATE

In a further twist, the California Supreme Court's finality rule, on its face, should have triggered the section 2254 statute of limitations 30 days from April 30, 1997, not April 30, 1997.

California Rule of Court 29 provides that review by the Supreme Court of an order of the Courts of Appeal is discretionary, conducted "where it appears necessary to secure uniformity of decision or the settlement of important questions of law." A denial of review disposes of a petition for review, but does not decide the underlying merits of the issues raised.

A state habeas corpus petition, however denominated, is unquestionably within the original jurisdiction of the California Supreme Court; it is not addressable merely under that Court's review jurisdiction. California State Constitution, Article VI, section 10. Indeed, petitioner's state habeas corpus petition was explicitly denied "on the merits" under the terms of the April 20, 1997 order. Indeed, respondent admitted that the California Supreme Court, when it denies habeas corpus petitions, always does so on the merits, which is obvious as the Court cannot simply decline to hear a matter within its original jurisdiction.

The rule happens to be different for intermediate courts of appeal in California. California Rule of Court 24(a) explicitly provides that a Court of Appeals' denial of "a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause" is immediately final. There is no corresponding rule for the California Supreme Court, however.

Yet the United States Court of Appeals held that the California Supreme Court's denial of petitioner's state habeas corpus petition was immediately final, construing a provision of the California court rules

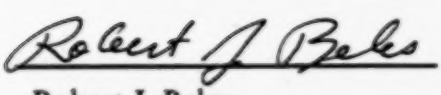
that had never been construed before. In doing so, they violated the basic rule of statutory construction "expresso unius est exclusio alterius" (the expression of one thing is the exclusion of the others). *Lindh v. Murphy,* 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). This rule is especially compelling when a provision is provided in one part of a particular statute or rule and omitted in another, as is the case with California Rule of Court 24. *Lindh v. Murphy, id.*

CONCLUSION

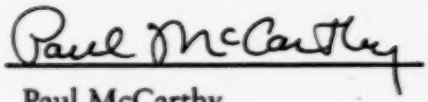
Public policy and overriding considerations of fairness and due process makes it necessary for this Court to grant certiorari in this case. This is more than a case of mere lack of notice of an event triggering the running of a statute of limitations. Here, the court in question affirmatively acted to mislead petitioner about that date. The court filed and served an order setting the date for denial of the petition as May 15, 1997. On April 30, 1997, two weeks before that date, the court filed ***but did not serve*** an order denying the petition. The effect was to create a procedural trap, the more so because the Court of Appeals declined to publish its memorandum decision and alert others that the trap might exist.

Section 2254's one year statute of limitations burdens the basic liberty interests of petitioners who are often without access to counsel and resources necessary to effectively petition the federal courts for relief from unconstitutional state convictions. Respondent has argued that this particular petitioner could have had counsel review the state Supreme Court's file for any hidden orders, but the issue goes beyond the situation of this particular petitioner. Very likely, the average prisoner petitioner would be unrepresented and in custody; such a petitioner could not It is only fair that such petitioners receive fair and adequate notice of any dates that trigger the statute of limitations.

Respectfully submitted Thursday, August 3, 2000.



Robert J. Beles



Paul McCarthy
Attorneys for Petitioner

INDEX

The opinions, orders, findings of fact and conclusions entered in conjunction with the judgment sought to be reviewed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15493 D.C. No. CV-98-02002-MMC

Kevin Phelps, Petitioner - Appellant,

V.

Edward Alameda, Warden, Deuel Vocational Institution, Tracy, California; People of the State of California, Respondents - Appellees

No. 99-15495 D.C. No. CV-98-02003-MMC

Jason Dorton, Petitioner - Appellant,

V.

Edward Alameda, Warden, Deuel Vocational Institution,- Tracy, California; People of the State of California, Respondents - Appellees.

ORDER

Before: O'SCANNLAIN, LEAVY, and RYMER, Circuit Judges.

The panel has voted to deny the petitions for rehearing. Judges O'Scannlain and Rymer have voted to deny the petitions for rehearing en banc and Judge Leavy so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter ell banc. Fed. R. App. P. 35.

The petitions for rehearing and petitions for rehearing en banc are DENIED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15493 D.C. No. CV-98-02002-MMC

KEVIN PHELPS, Petitioner - Appellant,

V.

EDWARD ALAMEDA, Warden, Deuel Vocational Institution, Tracy, California; PEOPLE OF THE STATE OF CALIFORNIA, Respondents - Appellees

No. 99-15495 D.C. No. CV-98-02003-MMC

JASON DORTON, Petitioner - Appellant,

V.

EDWARD ALAMEDA, Warden, Deuel Vocational Institution,- Tracy, California; People of the State of California, Respondents - Appellees.

Appeals from the United States District Court for the Northern District of California
Maxine M. Chesney, District Judge, Presiding
Submitted March 17, 2000** San Francisco, California

Before: O'SCANNLAIN, LEAVY, and RYMER, Circuit Judges.

Kevin Phelps and Jason Dorton appeal the district court's dismissal of their habeas petitions as barred by the one year statute of limitations. 28 U.S.C. § 2244(d). We have jurisdiction, 28 U.S.C. § 1291, and affirm.

Under Section 2244(d)(2), the statute of limitations begins to run on the date that the state post-conviction relief process ended. We agree with the district court that the Supreme Court's denial was an "order denying a petition for review" under Rule 24(a) of the California Rules of Court, not a "decision of the Supreme Court." When a habeas petition fails to make out a prima facie case, the California Supreme Court rejects it as "summary denial," In re Clark, 21 Cal.Rptr.2d 509, 521 n.9 (Cal. 1993); otherwise the court will issue an order to show cause. See In re Lawler, 151 Cal.Rptr. 833, 835 (Cal. 1979). As this did not happen here, and no order granting review was ever issued so as to make the order signed by the Chief Justice a decision after review, the order became final on the day on which it was filed (April 30,1997).

Phelps and Dorton argue that the AEDPA limitations period should be equitably tolled. However, no "extraordinary circumstances beyond a prisoner's control ma[d]e it impossible to file a petition on time." *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 9th Cir. 1998) (en banc) (internal quotations omitted). Here, counsel was notified that the petition might be denied before May 15, but failed to check with the California Supreme Court to determine whether it had been. This is quite different from Kelly, where the district court stayed habeas proceedings pending a competency determination, and *Calderon v. United States District Court (Beeler)*, 112 F.3d 386 9th Cir. 1997), as amended 128 F.3d 1283, where counsel preparing a habeas petition withdrew leaving a shambles. As the district court found, not even excusable neglect exists in this case, let alone extraordinary circumstances.

0 Finally, Phelps and Dorton submit that the district court should not have relied on a declaration by a California Supreme Court clerk, but we decline to consider this issue as it was not certified.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

***Since we affirm, Appellee's Motion to Certify State Law Issues to the California Supreme Court is denied as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN L. PHELPS and JASON DORTON, Petitioners,

V.

EDWARD ALAMEDA, Warden, Respondent.

No. C 98-2003 MMC

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Before the Court is respondent Edward Alameda's motion to dismiss as untimely the habeas petitions filled by Kevin L. Phelps and Jason Dorton. Respondent argues that petitioners filed their petitions two weeks late, and that the circumstances do not warrant equitable tolling of the statute of limitations. Petitioners argue that the petitions were timely filed, and even if they were not, the Court should equitably toll the limitations period.

The Court renders this decision based upon the papers filed in support of and in opposition to the motion, the arguments presented at the September 25, 1998 hearing, and the supplemental briefing.

II. BACKGROUND

Petitioners filed habeas petitions in the California Court of Appeal, which were denied On February 14, 1997, petitioners filed timely petitions for review with the California Supreme Court. On March 27, 1997, the Chief Justice filed an order stating: "The time for granting or denying review in the above cause is hereby extended to and including

May 15, 1997, or the date upon which review is either granted or denied." (Beles Decl., Ex. A).

On April 30, 1997, the Chief Justice filed an order denying the petition on the merits. (Mazza Decl., Ex. 4). Petitioners' counsel has filed a declaration that his office never received a copy of the April 30, 1997 order. (McCarthy Decl., P 4). Rule 24(a) of the California Rules of Court requires the California Supreme Court to mail copies of judgments to parties.

III. DISCUSSION

A. Legal Standard

Resolution of whether equitable tolling applies in a given case is generally not amenable to a motion to dismiss because the matter usually requires evaluation of facts outside the pleadings. *Supermail Cargo. Inc. v. United States,* 68 F.3d 1204, 1206 (9th Cir. 1995). "A motion to dismiss based on the running of the statute of limitations period may be granted only 'if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled."' *Id,,* quoting *Jabon v. Dean Witter P Co.*, 614 F.2d 677, 682 (9th Cir. 1980). "In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." Id.

B. Analysis

The instant motion requires the Court to decide two basic issues: (1) did petitioners file within the statute of limitations?; and (2) if petitioners failed to do so, should the Court equitably toll the limitations period to allow the petitions to survive?

1. Statute of Limitations

A one-year statute of limitations applies to habeas petitions filed in federal district courts. Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244, In the instant case, the one-year period is measured from "[t]he date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The period is tolled during pendency of "a properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). Respondent argues that collateral review ended and the limitations period began to run on April 30, 1997, making petitioners' May 15, 1998 filings two weeks late. Petitioners argue that the limitations period did not begin until May 30, 1997, or at the earliest, May 15, 19 making the filings timely.

a. The Denial Order

On April 30, 1998, the California Supreme Court issued an order denying the habeas corpus petitions. Under California Rules of Court, Rule 24(a), a "decision of the Supreme Court becomes final 30 days after filing," whereas an "order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed." (emphasis added). Respondent argues that the denial is an order and thus, became final on April 30, 1997, the date of filing. Petitioners argue that the denial a decision and thus, became final May 30, 1.997, thirty days after filing.

Although the California courts have not clearly articulated the difference between a decision and an order in the context of Rule 24(a), California jurisprudence in related contexts suggests that the distinction turns on whether the Supreme Court previously issued an order to show cause with respect to the habeas petition. When reviewing petition, the California Supreme Court may summarily deny a petition because a procedural bar applies or because the petitioner has failed to present a prima facie claim

See *In re Robbins*, 18 Cal.4th 770, 778, fn. 1 (1998) (discussing summary denials when there is a procedural bar or a failure to present a prima facie case); *In re Clark* 5 Cal. 4th 750, 769 n.9 (1993) (stating that summary denials are proper when petitioner fails to State a claim). The Court concludes that these summary denials are the orders to which 24(a) refers.

If the petition successfully states a claim, then the Court issues an order to cause, to which the petitioner may respond by filing a return. *In re Lawler,* 23 Cal.3rd 160 194-95 (1979). "Once an order to show cause or alternative writ issues, however, matter becomes a 'cause,' pursuant to the California Constitution (art. VI, s 14) and requires a written opinion." *In re Mazoros,* 76 Cal. App. 3d 50, 52-53 (1977). The concludes that such written opinions are the decisions to which Rule 24(a) refers.

In the instant case, the California Supreme Court summarily denied the petition without issuing an order to show cause. The disposition states: "Petition for review denied on the merits." (Mazza Decl., Exh. 4). Hence, the disposition is an order effective upon the filing date, April 30, 1997, and the statute of limitations expired one year later on April 30, 1998. Accordingly, the petitions, having been filed fifteen days later on May 15 19198, are untimely.

Petitioners argue that the use of the phrase "on the merits" means the disposition is a decision. The Court disagrees. Summary denials are considered "on the merits" even if the phrase is not recited. Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 10.92) ("The California Supreme Court's denial of a habeas petition without comment or citation constitute[s] a decision on the merits...."). Therefore, the Supreme Court's use of the phrase "on the merits" has no effect on the characterization of its ruling as an order or a decision. Rather, what distinguishes an order from a decision is the process by which the ruling was reached.

b. The Order Extending Time

Petitioners argue that even if the Supreme Court's disposition constitutes an order, the time for filing was extended until May 15, 1998 15 the day petitioners filed the writs. Petitioners base this argument on the order dated March 27, 1998, which stated: "The time for granting or denying review in the above cause is hereby extended to and including May 15, 1997, or the date upon which review is either granted or denied." (Beles Decl., Ex. A). Petitioners argue that although the Chief Judge signed a denial on April 30, 1997,

it did not become effective until May 15, 1997, fifteen days later, because four other justices did not join in the disposition.

California Rule of Court 28(f) provides:

Review by the [California] Supreme Court of a decision of a Court of Appeal may be granted by an order, signed by at least four judges, and filed with the clerk. The denial of review may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time [within which the Court may order review], the petition shall be deemed, denied and the clerk shall enter a notation in the register to that effect.

Rule 28(f) requires four justices to sign an order granting review, not orders denying review. For denials, such as the one issued to petitioners, the Chief Justice's signature is sufficient. The docket reflects this understanding as it shows the petition was denied on April 30, 1997. Accordingly, the denial became effective on April 30,1997 - "the date upon which review [was] denied."

2. Equitable Tolling

Petitioners argue that, even if they failed to file within the statute of

limitations, the Court should equitably toll the limitations period to May 15, 1998. Respondent argues that the circumstances surrounding petitioners' late filings do not warrant application of the equitable tolling doctrine. For the purposes of this motion, the Court will assume that - the California Supreme Court did not mail, and petitioners' counsel did not receive, the April 30, 1997 order denying habeas relief.'

The AEDPA's one year statute of limitations is subject to equitable tolling. *Calderon v Superior Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other Grounds, 1998 WL 848032, *11-12 (9th Cir., Dec. 8, 1998). Equitable tolling is available only where "'extraordinary circumstances' beyond a prisoners control make it impossible to file a petition on time." Id. (citation ornitted). District judges should only "authorize extensions when this high hurdle is surmounted." Id at 1289. Because the purpose of the statute of limitations is to "accelerate the federal habeas process," the Ninth Circuit has concluded that "[e]quitable tolling will not be available in most cases." Id. at 1288-89.

Neither party has cited nor has the Court found any habeas case discussing whether equitable tolling is justified when a court fails to mail notice of a judgment to the parties As respondent points out, however, the Ninth Circuit, has addressed the question of notice in the context of an untimely appeal from a district court judgment, and the court has made clear that "mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time.
Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1412 (9th Cir. 1986); see *Stevens v. [TT Systems*, 868 F.2d 1040, 1041-42 (9th Cir. 1989) (no excusable neglect when counsel knew judgment would soon be entered against client and failed to check with district court until after time for appeal had expired); *Kramer v. American Postal Workers Union, 556* F.2d 929, 930-31 (9th Cir. 1977) (no excusable neglect when counsel knew judgment would soon be entered, failed to contact court for three

months,. and "unquestioning [ly] reli[ed] on the lack of notice" from the district court).

Rather, to demonstrate "excusable neglect," counsel must act with "due diligence in ascertaining whether judgment ha[s] been entered." *Stevens v. ITT*, 868 F.2d at 1041; see *Zurich Ins. Co. v. Wheeler* 838 F.2d 338, 340 (9th Cir. 1988) (excusable neglect satisfied when counsel called district court clerk and was informed no judgment had been entered); *Rodgers v. Waft*, 722 F.2d 456, 458-59 (9th Cir. 1983) (excusable neglect satisfied where counsel thrice checked clerk's docket for entry of judgment, but clerical error in docket made it appear as though judgment had not yet been entered). The Ninth Circuit has so held, notwithstanding Federal Rule of Civil Procedure 77(d), which requires the court to immediately mail notice of entry of judgment to the parties. *Stevens v. ITT,* 868 F.2d at 1041.

In the instant case, petitioners' counsel placed unquestioning reliance on the lack of notice from the district court. Like counsel in *Alaska Limestone, Stevens* and *Kramer*, petitioners' attorney knew approximately when the judgment would be entered but never checked with the court to ascertain the actual date of entry. Moreover, petitioners' counsel had a full year to call the docket clerk, while the attorneys in *Alaska Limestone, Steve s* and *Kramer* had only thirty or sixty days.

The provision of Rule 24(a), California Rules of Court, requiring the California Supreme Court to mail copies of judgments to parties, does not change this conclusion. Just as counsel's reliance in Stevens on a similar rule, Federal Rule of Civil Procedure 77(d), did not excuse his failure to timely file, counsel's reiiance on Rule 24(a) likewise will not serve to excuse the untimely filings herein.

Further, contrary to petitioners' argument, Rule 28(f) of the California Rules of Court which provides for denial by operation of law, does not

entitle petitioners to assume that their petitions were "deemed denied" on May 15, 1997 when no notice was received. Making the assumption that the petitions were deemed denied is not significantly different than assuming a judgment was not entered, which the above cases demonstrate is not excusable. Indeed, petitioners' assumption is even less justifiable when one considers the California Supreme Court's practice of expressly granting or denying all petitions, despite Rule 28(f) which allows the court to do otherwise. (Wandruff Decl., 12).

Under the circumstances, petitioners have failed to make a showing of excusable neglect as that standard was defined and applied in the Ninth Circuit cases discussed above. As petitioners have failed to meet that standard, they also fail to meet the extraordinary circumstances standard applicable to the instant case.

Petitioners reliance on *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995), :.-1 support of equitable tolling, is misplaced. In *Hopi Tribe,* the Ninth Circuit held that the violated the due process rights of the Navajo Nation by failing to provide adequate notice of the BIA's land valuation, and thus, concluded that the appeal therefrom was timely. Hopi at 917-19. The Ninth Circuit based its decision on a regulation which explicitly extended the time to appeal in the absence of notice. Id. at 918 (discussing 25 C.F.R. § 2.4 (1985)). Unlike the regulation in *Hopi*, Rule 24(a) of the California Rules of Courtdoes not extend the time for appeal when notice is not provided. See *People v. Perry*, 223 Cal. App. 2d 466, 36 Cal. Rptr. 16 (1963) (failure to mail notice of judgment does not extend time for appeal). Furthermore, unlike Hopi Tribe, petitioners here point to not specific representations by respondent on which they relied.

Petitioners also cite *Supermail Cargo v. United States*, 68 F.3d 1204 (9th Cir. Supermail Cargo is inapposite, because, unlike respondent in the instant case, the respondent in Supermail Cargo affirmatively mislead petitioners with respect to the time for filing. Id, at 1205.

Finally, petitioners argue that cases involving the initial, direct appeal from a criminal conviction are analogous to the instant matter. In the context of first appeals from criminal convictions, an attorney's failure to file a timely appeal generally constitutes ineffective assistance of counsel. gae *United States v. Horodner,993* F.2d 191, 195 (9th Cir. 1 1993) (attorney's late appeal "prejudiced [defendant] in violation of his Sixth Amendment rights."); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (prejudice is presumed if attorney's failure to appeal is without petitioner's consent). As petitioners have a constitutional right to counsel for the first appeal, but not for habeas proceedings *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)), the Court finds petitioners' reliance on first appeal cases misplaced.

For the foregoing reasons, the Court finds that petitioners have failed to demonstrate that extraordinary circumstances made it impossible to file the petitions on time. Accordingly, the Court declines to equitably toll the statute of limitations and GRANTS respondent's motion to dismiss. IT IS SO ORDERED.

Dated: DEC 21 1998

MAXINE M. CHESNEY, United States District Judge

---

1 Accordingly, as the Court reads this factual issue in petitioners' favor, it is unnecessary for the Court to address petitioners' request for an evidentiary hearing and objections to evidence.

2. A district court may grant relief from an untimely appeal in cases of excusable neglect." Fed. Rule Civ. P. 60(b) and Fed. Rule App. P. 4(a)(1).

3. The Court is mindful that the law, as it presently stands, no longer requires a party filing an untimely appeal to demonstrate excusable

neglect if the party did not receive actual notice of the district court judgment. See *Nunley City of Los Angeles,* 52 F.3d 792, 798 (9th Cir. 1995) ("[T]he concept of excusable neglect has no place in the application cation of Rule 4(a) (6)."). The Court is also aware that "excusable neglect," as applicable in other contexts, now "'encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.'" *Marx v. Loral Corporation,* 87 F.3d 1049,1053-54 (9th Cir. 1996) (quoting *Pioneer Inv, Servs. Co. v. Brunswick Ltd,,* 507 U.S. 380, 388, 113 S. Ct. 1489, 1495 (1993)). Nevertheless, the excusable neglect standard, as analyzed in the Ninth Circuit cases discussed above, provides guidance in applying the 'extraordinary circumstances" standard applicable to the instant case.

PROOF OF SERVICE

I, the undersigned, depose and state: I am a resident or have my business address in Alameda County. I am over eighteen years of age and not a party to this action. My business address is 1 Kaiser Plaza, Suite 1750, Oakland, California, 94612. On Monday, August 7, 2000, I served the following:

Petition for Certiorari

I served the following persons by (X) mail ( ) personal delivery:

Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94105-2239
Attorneys for Respondent

I declare under penalty of perjury that the above is true. Executed in Oakland, California, on Monday, August 7, 2000.